

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2013AP925-CR

Cir. Ct. No. 2010CF269

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHASE M.A. BORUCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County:
GLENN H. HARTLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 MANGERSON, J. Chase Boruch appeals a judgment of conviction for first-degree intentional homicide of his mother, Sally Pergolski. He argues the trial court erred when, in response to a jury request during deliberations, it provided the State's autopsy and toxicology reports without also providing the

report of a defense pathologist, Dr. Bradley Randall. We conclude the court properly exercised its discretion, and any error would have been harmless. Accordingly, we affirm.

BACKGROUND

¶2 On the morning of June 6, 2010, Boruch called 911 and reported that his mother was trapped in his truck in Moraine Lake in Lincoln County. Lincoln County deputy Andrew VanderWyst arrived approximately ten minutes later and saw the truck partially submerged in shallow water. Pergolski was lying face down in the shoreline sand. VanderWyst could not find a pulse or signs of breathing, and resuscitation efforts were unsuccessful.

¶3 Boruch was transported to the hospital. He told medical personnel he and his mother were going fishing. He did not feel well, and Pergolski took over driving. The next thing he knew, the truck was going into the water. Boruch said he was not sure what happened.

¶4 Boruch was eventually charged with first-degree intentional homicide. Doctor Robert Corliss, the forensic pathologist who conducted Pergolski's autopsy, testified that there were no fatal wounds attributable to an auto accident, and he found no signs of death from natural causes. Corliss opined that Pergolski showed some characteristics of a drowning, but he refused to offer an opinion as to whether drowning contributed to her death. Corliss also found three features of strangulation or a nonspecific compression: a hemorrhage on the base of Pergolski's neck, four small hemorrhages on Pergolski's eyelid, and areas of soft tissue hemorrhages in Pergolski's neck. Corliss also found cells indicating Pergolski had experienced a hypoxic/ischemic injury—oxygen deprivation and

restricted blood flow to the brain—shortly before her death. However, Corliss could not conclude that strangulation was a cause of death.

¶5 Corliss was also aware that a toxicology screen indicated levels of tramadol and hydrocodone above the therapeutic range. A toxicologist indicated these drugs were present in toxic levels and at the low end of the lethal range. Corliss did not state whether the drugs were a possible cause of death.

¶6 Randall, an expert pathologist, testified for the defense. He opined that Pergolski could have died from drowning, sudden cardiac arrest, or an overdose of tramadol. He ascribed little significance to the neck and eyelid hemorrhages, but agreed that Pergolski may have experienced a hypoxic/ischemic episode in the hours or days preceding her death.

¶7 Corliss's preliminary and final autopsy reports were received into evidence, as well as the toxicology report and Randall's report.

¶8 While deliberating, the jury sent a note asking, "Can we have a copy of [the] autopsy report." The State argued, and Boruch agreed, that the preliminary and final autopsy reports should be sent to the jury. Boruch argued that two additional exhibits should be sent: the toxicology report and Randall's report.

¶9 The trial court determined that the autopsy reports and toxicology reports had been testified to "almost line by line." It agreed to give the jury those three documents. However, the court refused to send back Randall's report. It noted Corliss had refused to reach any conclusions regarding possible causes of death, whereas Randall had opined that Pergolski could have died from a number of conditions. After Boruch objected, the court elaborated:

The Court looked at [the Randall report], finds it not ... the autopsy reports are, shall we say, not opinionated in the classical sense. They deal with what was found, volumes of what was found. [They] [r]eally don't ... render a conclusion on cause of death or manner of death, where I find that [the Randall report] starts out with the summary of the facts ... as [Randall] knows them or gleaned them or felt they were from the reports that he had been given. Then he goes through his conclusions to a reasonable degree of medical certainty.

So these have all been things that have already been brought out. They're not objective facts. They're not looking at a scale or looking at a bruise, but [Randall's] opinions on the cause of death or lack of cause of death.

The court stated it would consider any jury request specifically for Randall's report. When Boruch subsequently moved for a mistrial, the court offered to send back the first two pages of Randall's report, which summarized Corliss's factual findings. However, the court stated there was "no way that I'm going to send back a listing of your expert's opinions ... as to cause of death or lack of cause of death, ... and not send the same thing back for the State, and it's not in their reports. It simply overemphasizes Dr. Randall's opinions."

¶10 The court denied Boruch's mistrial motion and the jury convicted Boruch. Boruch now appeals, arguing the court committed reversible error by refusing to submit Randall's report in response to the jury's request.

DISCUSSION

¶11 The circuit court has broad discretion to determine what exhibits are permitted in the jury room. *State v. Jensen*, 147 Wis. 2d 240, 259, 432 N.W.2d 913 (1988) (citing *Shoemaker v. Marc's Big Boy*, 51 Wis. 2d 611, 619, 187 N.W.2d 815 (1971)); *State v. Gilles*, 173 Wis. 2d 101, 116, 496 N.W.2d 133 (Ct.

App. 1992). We will uphold the circuit court's discretionary determinations absent an erroneous exercise of discretion. *See Gilles*, 173 Wis. 2d at 116.

¶12 A circuit court should consider three criteria when deciding whether to send exhibits into the jury room: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *Jensen*, 147 Wis. 2d at 260; *State v. Hines*, 173 Wis. 2d 850, 860, 496 N.W.2d 720 (Ct. App. 1993). The State concedes the circuit court “did not invoke *Hines* or organize its reasoning by walking through the three factors set forth in that case” However, we will nonetheless affirm if, after our independent review of the record, we can conclude there are facts which would support the court's decision had it properly exercised its discretion. *See Hines*, 173 Wis. 2d at 860-61.

¶13 We conclude the circuit court's decision was proper because Randall's report would not have aided the jury and could have been subjected to improper use. By the very terms of its request, the jury wanted the autopsy report. The trial court appropriately construed this request to mean the documents memorializing the data collected from the State's postmortem investigation. If the circuit court had responded by sending back Randall's report with the autopsy and toxicology reports, the court would have, in the State's words, “been implicitly sending the message that the Randall report was part of the autopsy documents” This may have caused the jury to place undue weight on Randall's conclusions regarding the potential cause of death. *See Shoemaker*, 51 Wis. 2d at 619 (trial court properly refused to submit written report to the jury when much of the report duplicated testimonial evidence and submission would have overemphasized the written portions of the report).

¶14 Boruch argues that in addition to setting forth factual findings, the autopsy reports also included Corliss’s opinions as to potential causes of death. He asserts that, as a matter of fairness, the jury should have been given Randall’s report as well. We are skeptical. The initial portions of the autopsy reports are arranged in outline fashion; the final autopsy report then includes six pages of detailed medical findings. Boruch reads two outline headings—“mild features of drowning” and “possible contribution of neck compression/injury”—to indicate Corliss’s opinions about potential causes of death.¹ While these headings arguably expand upon the factual content listed below them, it is unlikely the jury or any other reasonable reader of the autopsy reports believed these brief, simple headings reflected Corliss’s opinions about the ultimate cause of death, particularly when Corliss declined to give an opinion at trial. It appears more likely that these notations were simply used to categorize the factual information that followed.

¶15 Boruch also argues Corliss should have mentioned the heightened tramadol and hydrocodone levels more prominently in the final autopsy outline. He contends relegating the toxicology results to the end of the outline was as good as Corliss opining that drug overdose was not a possible cause of death. This is a

¹ The relevant portion of the final autopsy report reads:

- c) Mild features of drowning
 - I) Mildly heavy lungs with focal parenchymal and airway fluid collections
 - II) Small fluid matrix in stomach (60 cc)
- d) Possible contribution of neck compression/injury
 - I) Retropharyngeal and prevertebral facial hemorrhages
 - II) Focal petechiae on left lower eyelid

stretch for a number of reasons. Both autopsy reports mention the toxicology screen. The preliminary report outline clearly indicates that toxicology results are pending, and the final report devotes half of the second page to describing, in detail, the results of two separate screens. The notion that Corliss glossed over the toxicology results, or that a reader could draw any conclusions about Corliss's opinion from the placement of those results in the final autopsy report, is untenable.

¶16 Even if we were to construe Corliss's organizational strategy as his opinion regarding possible causes of death, we would nonetheless affirm because the error was harmless. An error is harmless if it did not contribute to the verdict. *State v. Harvey*, 2002 WI 93, ¶48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189. It must be clear “beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

¶17 Randall's report was not highly exculpatory. Randall indicated that drowning was possible, although this is “an exclusionary diagnosis used when no other causes of death are present in a body found in or near a body of water.” Randall opined Pergolski “may have died from a drug overdose,” although he acknowledged that the postmortem level of tramadol is “less than what is commonly associated with a lethal overdose” Randall opined that a hypoxic/ischemic episode may have occurred that predated Pergolski's death by at least a couple hours and rendered her unconscious, but he could not say what caused the episode. Randall also indicated that sudden cardiac arrest was possible. It is hard to see how the mere fact that Randall's report was not submitted to the jury would have led to a different result, particularly when Corliss and Randall agreed they could not conclusively determine how Pergolski died.

¶18 The State presented compelling circumstantial evidence of motive and opportunity. Boruch's former girlfriend testified that Boruch for years had been planning to take out life insurance on Pergolski just before she died. Pergolski had previously given Boruch over \$30,000, which he quickly spent. In the months preceding Pergolski's death, Boruch and Pergolski executed a will naming Boruch as the beneficiary and made Pergolski's bank account payable on death to Boruch.

¶19 Boruch also made numerous insurance inquiries in April and May. In April, Boruch and Pergolski applied for a \$250,000 term life policy with Farmers Insurance. They were issued a \$50,000 policy until the application was approved, and the Farmers agents testified that Boruch appeared to be driving the transaction and insisted on obtaining an accident policy rider even though he was told that Pergolski would not qualify. In May, American General Life issued Pergolski a \$500,000 accident policy, naming Boruch as the beneficiary. Boruch then applied for a \$300,000 accidental death policy on Pergolski's behalf from Fidelity Life. Boruch also purchased an accident-only policy through Life Quotes, which the president of that company deemed a "very rare" request. Boruch attempted to purchase insurance on Pergolski's behalf from Globe Life and Accident Insurance and, the day before Pergolski's death, added Pergolski to his auto policy and increased the benefit limits.

¶20 Boruch claimed his mother was complicit in the insurance purchases because she was planning to die soon and wanted her son to benefit. Boruch claimed Pergolski was often depressed and had thoughts about committing suicide by drug overdose. However, other than Boruch's self-serving testimony, there was no evidence that Pergolski was depressed or suicidal.

¶21 At trial, Boruch admitted he had tried to stage the accident scene and lied to investigators. Boruch explained that he found his mother at her home at 3:15 a.m. on June 6. She was unresponsive and lying on the living room floor. Boruch claimed he found a piece of meat lodged in her throat, pulled it out, and tried unsuccessfully to resuscitate her. Boruch explained he was on a large amount of opiates and, believing Pergolski had died, he then tried to stage the accident scene at the lake so he could collect insurance benefits for accidental death. He admitted he had not been truthful about the events of that morning, but denied causing his mother's death.

¶22 In the face of the overwhelming evidence of guilt, it would be unreasonable in the extreme to believe that submitting Randall's report to the jury would have persuaded a rational fact-finder that Boruch was not guilty beyond a reasonable doubt. As the State points out,

Dr. Randall's conclusion[s] that Pergolski could have died of a drug overdose or cardiac arrest did not square up with Boruch's new story about the choking, nor did Boruch supply details in his new version of events—such as the discovery of prescription pill[] bottles near her body or other signs of opioid overdose or signs of cardiac arrest—that would have supported any of Dr. Randall's opinions.

We conclude Boruch is not entitled to relief.

By the Court.—Judgment affirmed.

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